IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Mohammed Riyaz
vs.
Abdul Gaffar.

S.B.CIVIL SECOND APPEAL NO.465/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 18.11.2005 PASSED BY SHRI RAJKUMAR BHAGAT, ADDITIONAL DISTRICT JUDGE NO.1, JODHPUR IN APPEAL DECREE NO.36/2005.

DATE OF JUDGMENT ::: 20.12.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RK Thanvi, for the appellant.
Mr. MD Boob, for the respondent.

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REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the judgment and decree passed by the trial court dated 16.8.2005 and dismissal of his appeal by the appellate court vide judgment and decree dated 18.11.2005.

Brief facts of the case are that the plaintiff/respondent filed a suit against the defendant/appellant with clear allegation that the plaintiff and defendant both are co-owners of the property in dispute but the defendant after obtaining permission of the plaintiff, entered into one room, one kitchen and open chowk which were in possession of the plaintiff. The defendant/appellant was in need of said accommodation for the purpose of marriage of his son. The plaintiff permitted the defendant to enter in these premises with clear understanding that the defendant will vacate the said premises after the marriage of his son. The defendant did not vacate the portion which he took from the plaintiff, therefore, the plaintiff filed the suit for recovery of the above mentioned accommodation mentioned in the plaint with a prayer for mesne profits.

The trial court after considering evidence of both the parties, held that the defendant entered into the said portion of the house with the permission of the plaintiff and failed to deliver the possession of the said portion to the plaintiff after the marriage of the defendant's son, therefore, the plaintiff is entitled to decree for possession of the above portion of the house. The trial court decreed the suit of the plaintiff for mesne profits at the rate of Rs.500/- per month.

Aggrieved against the judgment and decree of the trial court, the defendant preferred appeal which was dismissed by the first appellate court. The plaintiff also preferred cross objections against the low award of mesne profits.

The first appellate court allowed the cross objections and increased the mesne profits from Rs.500/- to Rs.1000/- per month. Hence, this second appeal has been preferred by the appellant/defendant.

According to the learned counsel for the appellant, the suit of the plaintiff itself was not maintainable because of the fact that the plaintiff himself in his plaint admitted that the plaintiff and defendant both are co-owners of the property and suit by one co-owner against another co-owner for eviction is not maintainable. The plaintiff could have filed suit for partition if the plaintiff wanted to have possession from the defendant. Learned counsel for the appellant also tried to submit that in fact, the plaintiff was not in exclusive possession of the portion for which he has filed the suit in view of the fact that the possession of one co-sharer is possession of another co-sharer also, therefore, even if the plaintiff was in possession of the portion of suit property, then he was in possession as co-owner/co-sharer. Hence, the plaintiff's possession was also on behalf of the defendant also and the plaintiff and defendant both were in possession of every inch of the property in dispute also.

Learned counsel for the appellant also submitted that the first appellate court misread the evidence of DW3 and wrongly reached to the conclusion that the disputed property can fetch the rent at the rate of Rs.1,000/- per month.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below.

It is true that the plaintiff in his plaint clearly stated that the suit property is the ancestral property and the plaintiff and the defendant are the co-sharers in the suit property. It is also true that ordinarily, the possession of one co-sharer is possession on behalf of all co-sharers. In cases, where there is dispute between two co-sharers, one co-sharer cannot evict another co-sharer by filing mere suit for eviction. At the same time, a co-sharer, who is in exclusive possession of some part of the joint property in exercise of his right to live in the property has a right to live peacefully without interruption. In a case where co-owners and particularly when the property is ancestral, if the descendants of the original owner continued to live in the house having possession of some portion for their own exclusive use, they get right to live with dignity, honour and gets right of privacy which cannot be violated by any co-owner on the ground that he being co-owner has right over every inch of the property and, therefore, has right to violate the privacy and peace of another co-owner by entering into his portion of the property without permission of that co-owner. This right of the co-owner in possession does not violate the right of other co-owner in any manner nor it affects his title. It is a right of every person having inherent right to live with dignity and honour. In fact, if

the other co-owner, who is not in possession of particular portion of joint house, believes that he has right in other's occupation, then he can take possession by appropriate legal proceedings including filing suit for partition for getting possession of that portion which is in occupation of other co-owner. In instance case, the plaintiff was in possession of house and the defendant took possession of portion of house from the plaintiff and, therefore, he was in permissive possession only and his possession was not as of owner or co-sharer of the property despite the fact that the defendant is co-sharer/owner of the property. In this case, nature of possession was only relevant.

The co-owner, who enjoyed the property peacefully and that position continued for long, acquired right to protect his possession of that portion of joint proeprty and gets right to live with dignity even if it may result into some restriction over the other co-owner's right of enjoyment of “every inch of joint property”. By long acceptance of the position, the other co-owner accepted the position to remain out from the property or portion of that property, then he has no right to say that the co-owner in possession of particular portion of joint property has excluded him unlawfully. In a case where one of the co-owner seeks permission of another co-owner to enter into premises and take possession, he is bound to deliver the possession to that co-owner from whom he took possession without any objection.

In view of the above, the plaintiff's suit for possession for portion which he gave to the defendant was certainly maintainable without filing the suit for partition otherwise, it will encourage scrupulous persons who may destroy and violate the faith of their own co-sharers and co-owners of the property. One has no right to enter into premises after permission and thereafter, to say that his possession is not permissive possession since he is owner of the property, therefore, his possession is as of a owner.

The two courts below concurrently held that the defendant took the portion of the building from the plaintiff which is a pure question of fact decided by the two courts below against the defendant/appellant and, therefore, the plaintiff has right to recover possession of the property. In view of the above also, the courts below were right in decreeing the suit of the plaintiff.

So far as the question of mesne profits is concerned, learned counsel for the respondent clearly read the statement of D.W.3 in Court which reveals that DW3 unequivocally admitted that the rent of the disputed property itself can come at the rate of Rs.1,000/-, therefore, if the first appellate court granted the decree of mesne profits at the rate of Rs.1,000/-, then the appellant has no right to challenge this finding on the ground that this rent could have been fetched on the date the evidence was recorded and not prior to that.

In view of the above, I do not find any merit in the appeal. No substantial question of law is involved in this appeal, therefore, this appeal deserves to be dismissed, hence, dismissed.

(PRAKASH TATIA), J.

S.Phophaliya